## Omega Securities Sdn Bhd v Dato' Hamzah bin Abdul Majid

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1639 OF 2007
MAH WENG KWAI JC
4 NOVEMBER 2010

*Contract — Illegality — Contravention of law — Claim for recovery of contra losses by stock broking firm — Defendant alleged that plaintiff had granted loan to him — Whether sum claimed was for recovery of contra losses or for loan — Whether plaintiff's claim void for illegality and unenforceable against defendant — Whether defendant adduced sufficient evidence to support his contention of loan — Non-stamping of agreement — Whether non-stamping of document invalidated agreement — Whether plaintiff's claim time barred*

The plaintiff, a licensed stock broking firm, had granted the defendant a margin trading facility ('MTF') of up to a limit of RM10m to enable him to trade on the securities listed on the Kuala Lumpur Stock Exchange ('KLSE'). When the defendant carried out shares sale and purchase transactions on his margin trading account ('MTA') which resulted in contra losses, the plaintiff issued a notice of termination dated 18 April 2005 and demanded payment of the total sum of RM12,658,779. When the plaintiff's company was wound up on 8 July 2004, it filed an action through its liquidator claiming the recovery of the said sum of RM12,658,779, being contra losses including interest from the defendant. The plaintiff claimed that the defendant had carried out shares sale and purchase transactions on his MTA which had resulted in the contra losses claimed. In response the defendant argued that no MTF was granted by the plaintiff to the defendant and that he had not carried out any share trading transactions. Instead the defendant claimed that he had obtained a loan of RM8m from the plaintiff, with the defendant having pledged his shares in Wembley Industries Holdings Bhd ('Wembley shares') as security for the loan. It was the defendant's contention that the grant of the loan by the plaintiff was in contravention of the KLSE Rules, Banking and Financial Institutions 1989 and Securities Industry Act 1983 and was therefore void for illegality and unenforceable against the defendant. The defendant also submitted that the plaintiff's claim against him was time-barred as the claim was commenced six years after the date of the first demand on 27 May 1999. The plaintiff maintained that it was at all times in the business of share broking and trading, and submitted that at all material times the defendant was its client. The plaintiff denied having lent the defendant RM8m by disbursing the loan sum

into the defendant's account with the Public Bank and denied that the defendant's shares in Wembley were pledged as security for the said loan.

**Held**, allowing the plaintiff's claim with costs:

(1) As the defendant had signed the relevant documents required by the plaintiff to obtain MTA for the defendant to trade in the share market and since there was no evidence to suggest that those signatures were forgeries, the defendant was bound by those documents. The fact that the defendant could not remember whether the documents were to open the MTF and to trade on the MTA could not be utilised to afford a defence to the defendant. The defendant was estopped from denying his obligations under the MFA and was bound by the principle of non est factum. In the light of the circumstances of this case and the authorities, it was found that the plaintiff had proven that the defendant had opened the MTF with the plaintiff and that the defendant knew or ought to have known the rights and liabilities arising from it (see paras 23–24 & 28).

(2) Although the court did not preclude the defendant from relying on the defence of a loan it was a finding of the court that this defence was raised for the first time at trial as an afterthought. The defendant had never pleaded in his defence or had never raised in his summary of case that he had obtained a loan of RM8m from the plaintiff. It was only during the trial, in the course of cross-examining the plaintiff's witnesses, that the defendant raised the issue of the loan for the first time. If the allegation of a loan was true, the defendant ought to have pleaded fraud and illegality against the plaintiff but he did not do so. After considering the evidence relied on by the defendant to support his contention of a loan, the court was satisfied on a balance of probabilities that the defendant did not obtain a loan from the plaintiff. The sum claimed by the plaintiff was for the recovery of contra losses and not for a loan (see paras 29–30 & 33–36).

(3) Based on the evidence it was found that the plaintiff had not granted the defendant a loan. The defendant had failed to explain the terms and conditions of the alleged loan and not produced the Public Bank statement of accounts to support his contention that the plaintiff had deposited the loan monies into the said account. The contemporaneous events and documents also did not support the defendant's allegation of a loan. Further it was inconceivable that the plaintiff would have given a loan of RM8m to the defendant when only shares worth about RM177,500 were allegedly pledged as security for the loan (see paras 36(b), (h) & (m)).

(4) The fact that the margin facility agreement ('MFA') was not stamped did not invalidate it. The non-stamping of a document did not invalidate the document unless the non-stamping went to the root or validity of the

document itself. In this case, the non-stamping of the MFA was only an issue of government revenue and did not go to the validity of the document (see paras 38–40).

(5) When the defendant failed to meet his obligations under the MFA, the plaintiff issued a notice of termination dated 18 April 2005. The said notice of termination would, pursuant to s 6(1)(a) of the Limitation Act 1953, expire on 17 April 2011, but as the writ of summons was filed on 20 November 2007, the plaintiff was well within time to commence this action (see para 45).

**[Bahasa Malaysia summary**

Plaintif, firma broker saham berlesen, telah memberikan defendan kemudahan margin dagangan ('KMD') sehingga had RM10 juta untuk membolehkannya memperdagangkan sekuriti yang tersenarai di Bursa Saham Kuala Lumpur ('BSKL'). Apabila defendan menjalankan transaksi jualbeli saham melalui akaun margin dagangannya ('AMD') yang mengakibatkan kerugian kontra, plaintif telah mengeluarkan notis penamatan bertarikh 18 April 2005 dan menuntut bayaran sejumlah RM12,658,779. Apabila syarikat plaintif digulungkan pada 8 Julai 2004, ia telah memfailkan tindakan melalui penyelesainya dengan menuntut balik jumlah RM12,658,779 tersebut, iaitu kerugian kontra termasuk faedah daripada defendan. Plaintif mengatakan bahawa defendan telah menjalankan transaksi jualbeli saham melalui AMDnya yang mengakibatkan kerugian kontra yang dituntut. Defendan telah menjawab dengan berhujah bahawa tiada KMD telah diberikan oleh plaintif kepada defendan dan bahawa dia tidak menjalankan apa-apa transaksi dagangan saham. Sebaliknya defendan mengatakan bahawa dia telah memperoleh pinjaman RM8 juta daripada plaintif, yang mana defendan telah meletakkan sahamnya dalam Wembley Industries Holdings Bhd ('syer Wembley') sebagai cagaran untuk pinjaman itu. Ini adalah hujah defendan bahawa pemberian pinjaman oleh plaintif bertentangan dengan Peraturan BSKL, Akta Bank dan Institusi-institusi Kewangan 1989 dan Akta Sekuriti 1983 dan oleh itu adalah tidak sah kerana kepenyalahan undang-undang dan tidak boleh dikuatkuasakan terhadap defendan. Defendan juga berhujah bahawa tuntutan plaintif terhadapnya telah luput masa kerana tuntutan itu dimulakan enam tahun selepas tarikh tuntutan pertama pada 27 Mei 1999. Plaintif menegaskan bahawa ia pada setiap masa dalam perniagaan dagangan dan broker saham, dan berhujah bahawa pada setiap masa matan defendan merupakan pelanggannya. Plaintif menafikan telah memberi pinjaman kepada defendan RM8 juta dengan memasukkan jumlah pinjaman itu ke dalam akaun defendan dengan Public Bank dan menafikan bahawa saham defendan dalam Wembley telah dicagarkan sebagai sekuriti untuk pinjaman tersebut.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos:

(1) Oleh kerana defendan telah menandatangani dokumen relevan yang

diperlukan oleh plaintif untuk mendapatkan AMD agar defendan berdagang dalam pasaran saham dan memandangkan tiada keterangan untuk mencadangkan bahawa tandatangan tersebut telah dipalsukan, defendan terikat dengan dokumen-dokumen tersebut. Fakta bahawa defendan tidak ingat sama ada dokumen tersebut adalah untuk membuka KMD dan untuk berdagang melalui AMD tidak boleh digunakan sebagai pembelaan defendan. Defendan telah diestopkan daripada menafikan kewajipannya di bawah AMD dan adalah terikat dengan prinsip non est factum. Berdasarkan keadaan kes ini dan autoriti-autoriti, adalah didapati plaintif telah membuktikan bahawa defendan telah membuka KMD dengan plaintif dan bahawa defendan mengetahui atau patut mengetahui tentang hak dan liabiliti yang timbul daripadanya (lihat perenggan 23–24 & 28).

(2) Walaupun mahkamah tidak menghalang defendan daripada bergantung kepada pembelaan pinjaman ia adalah penemuan mahkamah bahawa pembelaan ini telah dibangkitkan untuk kali pertama semasa perbicaraan sebagai suatu yang yang telah difikirkan kemudian. Defendan tidak pernah memplid dalam pembelaannya mahupun tidak pernah menimbulkan dalam ringkasan kesnya, semasa pemeriksaan balas saksi-saksi plaintif, bahawa defendan telah menimbulkan isu pinjaman itu buat pertama kali. Jika pengataan tentang pinjaman itu benar, defendan patut membuat pli untuk fraud dan kepenyalahan undang-undang terhadap plaintif tetapi dia tidak berbuat demikian. Setelah menimbangkan keterangan yang digunakan oleh defendan untuk menyokong hujahnya tentang pinjaman itu, mahkamah berpuas hati atas imbangan kebarangkalian bahawa defendan tidak memperoleh pinjaman daripada plaintif. Jumlah yang dituntut oleh plaintif adalah untuk mendapat balik kerugian kontra dan bukan untuk pinjaman (lihat perenggan 29–30 & 33–36).

(3) Berdasarkan keterangan adalah didapati bahawa plaintif tidak memberikan defendan pinjaman. Defendan telah gagal menjelaskan terma dan syarat pinjaman yang dikatakan itu dan tidak mengemukakan kepada Public Bank penyata akaun bagi menyokong hujahnya bahawa plaintif telah memasukkan wang pinjaman itu ke dalam akaun tersebut. Kejadian dan dokumen semasa itu juga tidak menyokong pengataan tentang pinjaman oleh defendan. Selanjutnya ia suatu yang tidak boleh diterima bahawa plaintif akan memberikan pinjaman RM8 juta kepada defendan walhal saham yang hanya bernilai lebih kurang RM177,500 dikatakan telah diletakkan sebagai cagaran untuk pinjaman itu (lihat perenggan 36(b), (h) & (m)).

(4) Fakta bahawa perjanjian kemudahan margin ('PKM') tidak disetemkan tidak menjadikannya tidak sah. Dokumen yang tidak disetemkan tidak menjadikannya tidak sah kecuali jika dengan tidak meletakkan setem

pada dokumen itu memberi kesan kepada akar umbi atau kesahannya. Dalam kes ini, PKM yang tidak disetemkan hanya isu hasil pendapatan kerajaan dan tidak menjejaskan kesahan dokumen (lihat perenggan 38–40).

(5) Apabila defendan gagal memenuhi kewajipannya di bahwa PKM itu, plaintif telah mengeluarkan notis penamatan bertarikh 18 April 2005. Notis penamatan itu akan luput pada 17 April 2011 menurut s 6(1)(a) Akta Had Masa 1953 tetapi oleh kerana writ saman telah difailkan pada 20 November 2007, plaintif masih dalam had masa untuk memulakan tindakan ini (lihat perenggan 45).]

**Notes**

For cases on contravention of law, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4235–4251.

**Cases referred to**

*American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727; [1992] 1 CLJ (Rep) 1, SC (refd)

*Bumiputra-Commerce Bank Bhd and Ors v Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825, HC (refd)

*Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 (refd)

*Eng Say Kuang v Hong Leong Bank Bhd* [2008] 10 CLJ 197, HC (refd)

*Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, SC (refd)

*Letang v Cooper* [1965] 1 QB 232 (refd)

*Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249, HC (refd)

*Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198; [1982] CLJ (Rep) 217, FC (refd)

*Saunders v Anglia Building Society (an appeal from Gallie v Lee)* [1971] AC 1004, HL (refd)

*Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 (refd)

*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, SC (refd)

**Legislation referred to**

Companies Act 1965 s 236(2)(a)
Contracts Act 1950 s 24
Evidence Act 1950 ss 90A, 114(g)
Limitation Act 1953 s 6(1)(a)
Securities Industry Act 1983
Stamp Act 1949 (Revised 1989) s 52

*R Venayaga (Derrick Ong with him) (Skrine) for the plaintiff.*
*Redza (Ramesh and Eric Chong with him) (Adnan Sundra & Low) for the defendant.*

**Mah Weng Kwai JC:**

THE PLAINTIFF'S CASE

**[1]** By its statement of claim dated 28 November 2007 the plaintiff claimed for the sum of RM12,658,779 as at 18 April 2005 being contra losses including interests in the sum of RM5,997,788.53 at the rate of 13.5%pa calculated on a daily basis from 19 April 2005 till the date of full settlement and costs against the defendant.

**[2]** The plaintiff, a former stock broking company having been wound-up on 8 July 2004 filed this action through its liquidator pursuant to s 236(2)(a) of the Companies Act 1965.

**[3]** On 4 September 1997 the plaintiff issued a letter of offer to the defendant to open an individual share trading account. The defendant accepted the offer and signed an undated individual account application form and an undated margin facility agreement ('MFA'). The plaintiff granted a margin trading facility ('MTF') of up to a limit of RM10m to the defendant to enable him to trade on the securities listed on the Kuala Lumpur Stock Exchange. At all material times, the defendant being a client of the plaintiff maintained a margin account vide account No HA600/DLH.

**[4]** The plaintiff claimed that the defendant carried out shares sale and purchase transactions on the margin account which resulted in contra losses. Copies of the contract notes and contra statements in relation to the transactions are exhibited in bundle D pp 35–43.

**[5]** The plaintiff's contra notes, contra statements, margin financing reports, outstanding balance, client history transaction, notices from the plaintiff to the defendant and other documents on the outstanding balance are computer print-outs. The plaintiff tendered a certificate pursuant to s 90A of the Evidence Act 1950 (bundle D1 pp 4–5) for the purpose of admitting the computer print-outs in evidence.

**[6]** The plaintiff terminated the MFA on 18 April 2005 and claimed for the total sum of RM12,658,779.

THE DEFENDANT'S CASE

**[7]** The defendant claimed that no MTF was ever granted by the plaintiff to

the defendant. In his evidence the defendant recalled signing some documents but was not sure whether the documents were in respect of the MTF.

**[8]** The defendant claimed that he did not carry out any share trading transactions on the margin account but had instead obtained a loan of RM8m from the plaintiff, with the loan sum being deposited on 5 September 1997 into the bank account of his company known as Cempaka Holdings Sdn Bhd ('Cempaka Holdings'). As security for the loan the defendant had deposited 15,939,000 Wembley Industries Holdings Bhd shares ('Wembley shares') with the plaintiff on the understanding that the shares would be sold from time to time to repay the loan. At the material time the defendant was the chairman of Wembley Industries Holdings Bhd.

**[9]** The defendant contended that the grant of the loan by the plaintiff was in contravention of the Kuala Lumpur Stock Exchange Rules, Banking and Financial Institutions Act 1989 and the Securities Industry Act 1983 and was therefore void for illegality pursuant to s 24 of the Contracts Act 1950 and unenforceable against the defendant.

**[10]** The defendant also submitted that the plaintiff's claim was time barred with the period of limitation of six years being applicable in this case from the date of the first demand made on 27 May 1999.

**[11]** The defendant prayed that the plaintiff's claim be dismissed on the grounds of illegality, that the plaintiff had failed to discharge its burden of proof and that the claim was time barred under s 6(1)(a) of the Limitation Act 1953.

THE PLAINTIFF'S REPLY

**[12]** The plaintiff was at all times in the business of share broking and trading and not in moneylending.

**[13]** The allegation of a loan was not pleaded by the defendant in his defence.

**[14]** The plaintiff did not give a loan of RM8m to the defendant and did not disburse the alleged loan to the Public Bank account of Cempaka Holdings.

**[15]** The Wembley shares pledged by the defendant were as collateral to enable the defendant to trade on the margin account. They were not pledged as security for the loan.

**[16]** The plaintiff was not obliged and did not fail to sell the defendant's Wembley shares to cover the sum owing by the defendant when the price of the Wembley shares was still good.

**[17]** The plaintiff was not obliged to sell all of the defendant's Wembley shares before commencing an action to recover the sum due and owing by the defendant.

**[18]** The action of the plaintiff was not time barred.

MAIN ISSUES TO BE DETERMINED BY THE COURT

**[19]** The main issues, inter alia, are:

(a) Whether a MTF was granted by the plaintiff to the defendant to enable the defendant to trade on the margin account and whether the defendant's pledge of a total of 15,939,000 Wembley shares was security for the margin account or was security for the loan.

(b) Whether a sum of RM8m was given as a loan by the plaintiff to the defendant in breach of the relevant rules and regulations.

(c) Whether the plaintiff was negligent in failing to sell the defendant's Wembley shares in 1998 when instructed by the defendant to do so.

(d) Whether the MFA is invalid due to non-stamping.

(e) Whether the plaintiff was in breach of the Kuala Lumpur Stock Exchange Rules 1997, the Banking and Financial Institutions Act 1989 and the Securities Industry Act 1983.

(f) Whether the plaintiff's claim is time barred under s 6(1)(a) of the Limitation Act 1953.

DECISION OF THE COURT

**[20]** After a full trial during which two witnesses gave evidence in support of the plaintiff's claim and the defendant gave evidence in support of his own case and after considering the very lengthy written submissions of both counsel for the plaintiff and the defendant, the court held that the plaintiff had proven its claim on a balance of probabilities and accordingly entered judgment as prayed for the plaintiff with costs to be taxed.

REASONS FOR THE DECISION

*Issue 1*

Whether there was a MTF granted by the plaintiff to the defendant

**[21]** The defendant signed the individual account application form, the letter of offer dated 4 September 1997 and the MFA. The defendant's signature can be seen in bundle D pp 3, 10 and 13.

**[22]** The defendant in his evidence recalled signing some documents given to him by the plaintiff but was unsure whether the documents referred to in para 1 above were the documents signed.

Finding

**[23]** It is the finding of the court that the defendant did sign the relevant documents required by the plaintiff to open a margin account for the defendant to trade in the share market.

**[24]** There is no evidence whatsoever to suggest that the signatures appearing in bundle D at pp 3, 10 and 23 are forgeries. The defendant recognised the signatures as being his signature. In his evidence, the defendant admitted signing some documents given to him by the plaintiff but just that he was not sure whether the documents were in respect of the MTF. The fact that the defendant cannot remember or recall whether the documents were to open the MTF and to trade on the margin account following his acceptance of the letter of offer dated 4 September 1997 cannot be utilised to afford a defence to the defendant. The defendant in law will be estopped from denying his obligations under the MFA. The defendant will be bound by the principle of non est factum.

**[25]** In the case of *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 Chua J adopted the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 that a 'signature is irrefragable evidence of (a person's) assent to the whole contract'. At p 114 Chua J held:

> I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, then, to use the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co* 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'.

Chua J went on to quote Scrutton LJ in the case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, who said:

> When a document containing contractual terms is signed, then, in the absence of fraud; or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

**[26]** In the House of Lords case of *Saunders v Anglia Building Society (an appeal from Gallie v Lee)* [1971] AC 1004, Lord Reid held that the plea of non est factum cannot be available to anyone who was content to sign without taking the trouble to try to find out the general effect of the document and that it is for the person who seeks the remedy to show that he should have it.

**[27]** Further in the case of *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 David Wong J alluded to the legal principle of the plea of non est factum as aptly summarised by Visu Sinnadurai J in his book the *Law of Contract* (3rd Ed) at p 319 as follows:

> The law on non est factum was reviewed and restated by the House of Lords in *Saunders v Anglia Building Society* (*Gallie v Lee*). The House of Lords spelt out the following principles of law governing the plea of non est factum:
>
> (a) The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate, any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.
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> (b) The burden of establishing a plea of non est factum falls on that party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; It is not, however, an instance of negligence by way of estoppel.
>
> (c) In relation to the extent and nature of the difference between the document as it is and the document as it was believed to be, the distinction formerly drawn between the character and the contents of the document is unsatisfactory and it is essential, if the plea is to be successful, to show that there is a radical or fundamental distinction.

**[28]** In light of the circumstances of this case and the authorities, I hold that the plaintiff has proven that the defendant had opened the MTF with the plaintiff and that the defendant knew or ought to have known his rights and liabilities arising from the MFA.

*Issue 2*

Whether the claim of a loan by the defendant ought to be accepted by the court

**[29]** It is clear that the defendant never pleaded in his defence that he had obtained a loan of RM8m from the plaintiff. The defendant also did not raise the issue of a loan in the defendant's summary of case. The defendant had previously applied to strike out the plaintiff's claim but he had not averred in the affidavit in support of the summons in chambers that a loan had been granted to him.

**[30]** It was only during the trial that counsel for the defendant raised the issue of the loan when cross-examining the plaintiff's witnesses. The defendant did not at any time, up to the end of the trial make any application to amend his defence to include the issue of a loan. It is trite that the defendant could have applied to amend his defence at any stage of the proceedings (see *Bumiputra-Commerce Bank Bhd and Ors v Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825).

**[31]** Counsel for the plaintiff however, did not object to the questions relating to the alleged loan by counsel for the defendant during the cross-examination of PW1. When asked by the court on whether he was raising any objection to the defence of a loan which had not be pleaded in the defence, counsel for the plaintiff informed the court that he would do so in his submission. As counsel for the plaintiff did not take the opportunity to raise his objection at that stage of the proceedings, I allowed counsel for the defendant to proceed to cross-examine PW1 on the alleged loan. Counsel for the plaintiff chose not to raise the objection not because he did not know the law or had overlooked the matter but elected to do so in his submission.

**[32]** It is trite law that an objection must be made then and there at the point of time when such evidence emerges. Making the objection in the submission will be too late and will not be entertained by the court. In the Supreme Court case of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 [1994] 3 CLJ 567 Peh Swee Chin SCJ held:

> The rule is that if a party is taken by surprise by evidence which departs from pleaded material facts, he must object then and there at the point of time when such evidence emerges, in order for such evidence to be disregarded by the court. It will be too late when it is objected to later on, as in the final submission at the close of the evidence, as happened in the instant case. Acceptance by the court of such late objection would result in the party adducing such evidence to face the great risk of being denied leave to amend his pleading in question at that stage.

**[33]** Although the court did not preclude the defendant from relying on his defence of a loan it was a finding of the court that the defence of a loan was raised for the first time by the defendant at trial as an afterthought. The reasons for this finding will be discussed at length later.

**[34]** If the allegation of a loan is true then that would render all the sale and purchase transactions of shares in the defendant's margin account being fraudulent and tainted with illegality. That being so, the defendant ought to have pleaded fraud and illegality against the plaintiff. This the defendant did not do.

**[35]** After considering the evidence relied on by the defendant to support his contention of a loan, I was satisfied on a balance of probabilities, that the defendant did not obtain a loan from the plaintiff. I found as of fact that the defendant did trade on the margin account granted by the plaintiff and accordingly entered judgment as prayed for the plaintiff.

**[36]** It is the finding of the court that at all material times the plaintiff did not grant a loan to the defendant for the following reasons:

(a) The plaintiff was a licensed stock broking firm and not a moneylending company. There was no evidence to suggest that the plaintiff had departed from its only business of stock broking to accommodate the request of the defendant for a loan, if indeed such a request was made.

(b) The defendant had failed to explain to the court the terms and conditions of the alleged loan. No evidence was led by the defendant at all to show how the alleged moneylending transaction came about. The court was left in the dark as to whom the defendant had approached in the plaintiff company for the loan. Surely, to obtain the approval for such a huge sum as a loan, the defendant must have met, discussed and secured the approval of the decision-maker in the plaintiff's company. However no name(s) of anyone in the plaintiff company was mentioned by the defendant. Further, the court was not informed as to when the defendant had approached the plaintiff for a loan.

(c) The defendant did not inform the court of the terms of repayment of the alleged loan namely, the tenure of the loan and the mode of repayment to the plaintiff. All that the defendant said was that he had pledged his Wembley shares with the plaintiff and that those shares would be sold and proceeds thereof would be used to repay the plaintiff. There was no evidence adduced to show that the defendant had at any time asked the plaintiff for information on the status of the repayment of the alleged loan. He did not even bother to find out the number or the value of shares sold and the balance amount still owing to the plaintiff. This total lack of interest and lackadaisical attitude of the defendant do not support the

contention by the defendant that his Wembley shares were sold to repay the loan and were not part of share trading under the margin account.

(d) If the plaintiff did in fact give a loan they would have run foul of the rules and regulations of the Kuala Lumpur Stock Exchange Rules, the Banking and Financial Institutions Act 1989 and the Securities Industry Act 1983 yet there was absolutely nothing to suggest that the plaintiff had done so to merely benefit the defendant.

(e) The defendant in his evidence said that the plaintiff disbursed the RM8m loan to his account. In his cross-examination it was established that a sum of RM7,953,750 was credited into the Public Bank account of Cempaka Holdings of which the defendant was a shareholder and director. Although it may be accepted that when the defendant referred to 'my account' he was in fact referring to the account of Cempaka Holdings there is no evidence to show that the sum of RM7,953,750 was in fact credited into the account of the defendant's company by the plaintiff by way of a loan.

(f) The defendant did not produce the audited accounts of Cempaka Holdings for the year 1997 and no confirmation was forthcoming from the auditor of the company to account for either the receipt of the RM7,953,750, the source of the money, the purpose of the remittance or the eventual disbursement of the money. In short there was no evidence of any query being raised by the auditor of the company on the source and purpose of the remittance. If the money was required by the defendant who had obtained the same by way of a loan from the plaintiff, some evidence at least should have been given by the defendant to show that the money was eventually released to him by Cempaka Holdings. This the defendant did not do.

(g) Up to the close of the defence case, the defendant did not produce the Public Bank statement of accounts of Cempaka Holdings nor the annual statement of accounts of Cempaka Holdings to support his contention that the money deposited into the account of Cempaka Holdings was a loan from the plaintiff.

(h) The contemporaneous events and documents do not support the defendant's allegation of a loan:

(i) when the defendant met with the liquidators of the plaintiff in 1998 to discuss the status of the defendant's account, no mention of the loan was made to the liquidators.

(ii) the defendant's solicitor's letter from as early as 25 June 1998 did not mention anything about a loan. (See bundle B p 1.)

(iii) the plaintiff's solicitor's letter of 18 April 2005 informed the defendant that the MFA was terminated/recalled with immediate

effect and he was owing a sum of RM12,658,797 on the MTF (bundle B p 13) yet there is no evidence of any letter written by the defendant or his solicitors to refute the claim of the plaintiff and to assert that any outstanding sum was in fact the balance of the loan due.

(iv) monthly and/or quarterly statements on the trading account were sent by the plaintiff to the defendant at his given address. Although the defendant made a feeble attempt to deny receiving the statements yet no good reason was given as to why none of the statements were ever received. There was no dispute that the address on the statements bore the correct address of the defendant. The defendant on reading the statements would clearly have known the status of his margin account.

(v) the plaintiff had in fact written a letter to the defendant dated 27 May 1999 (bundle D p 80) requesting the defendant to give a proposal in writing to settle the amount outstanding in his margin account. The letter also referred to a meeting between the defendant, his wife and one Jimmy Ng of the plaintiff company. Yet the defendant did not reply this letter to protest that there was no trading in the margin account and that the money received by Cempaka Holdings was a loan instead. The defendant did not deny that a meeting was held with Jimmy Ng to discuss the margin financing report as at 5 June 1998 and the statement of outstanding balance as at 30 April 1999. Further the defendant did not even dispute the address to which the letter was sent was incorrect. It will be remembered that the address on all the monthly and/or quarterly statements bore the same address. When the defendant was cross examined on this letter (bundle D p 80) the defendant replied lamely that he could not remember the meeting referred to in the letter.

(i) The defendant did not at any time offer any explanation as to why he did not approach a bank if indeed he wanted a loan. He could have quite easily pledged his shares as security for a bank loan without having to enter into the MFA and to open the margin account.

(j) No clear evidence was adduced that it was the plaintiff that had remitted the RM7,953,750 into the defendant's Cempaka Holdings account by way of a loan. At the trial, the defendant tendered the Public Bank statement of Cempaka Holdings to show that a sum of RM7,953,750 had in fact been deposited into the account on 5 September 1997. The attention of the court was drawn to the third entry in the bank statement found in bundle J at p 1. The fact that the sum of RM7,953,750 had been

deposited into the account of Cempaka Holdings cannot be denied, but the question that needs to be answered is why was the said sum deposited and by whom.

(k) The defendant contended that the contract note (bundle D p 35) was not genuine. However, no evidence was adduced by the defendant to challenge the authenticity of the contract note. A perusal of the contract note will show that a sum of RM8,000 was payable as stamp duty. If indeed a loan was given by the plaintiff to the defendant, there should be no stamp duty of RM8,000 payable appearing in the contract note.

(l) If, as claimed by the defendant the sum of RM7,953,750 was disbursed as a loan, there should be no record of trading whatsoever by the defendant on the margin trading account. However the client history transaction in bundle D from pp 73–79 clearly shows that a very substantial amount of trading of close to RM70m had been carried out on the account.

(m) It is inconceivable that the plaintiff would have given a loan of RM8m to the defendant when only 540,000 Wembley shares worth about RM177,500 were pledged as security by the defendant as at 4 September 1997. If it was indeed a loan, there must have been further and elaborate arrangements entered into between the defendant and the plaintiff than meet the eye but the defendant is not telling.

(n) Lau Jiong Chean ('PW1'), a finance manager denied that the contra note dated 5 September 1997 (bundle D p 35) which shows that the defendant had purchased 5 million Wembley shares in the total sum of RM8,054,250 inclusive of brokerage fee of RM46,250 and stamp duty of RM8,000 was not a device to disburse the loan sum of RM8m to the defendant. PW1 maintained that if a loan of RM8m was to be made to the defendant there would have been no need for the defendant to pay brokerage fees of RM46,250.

(o) PW1 during his cross examination agreed with the counsel for the defendant that the sum of RM8m was remitted to the defendant's account on 5 September 1997. However, PW1 when recalled denied that the plaintiff had remitted the sum of RM8m to Cempaka Holdings on 5 September 1997 as a loan to the defendant. In his further cross-examination, PW1 explained that he was changing his evidence as he had made a mistake when replying to counsel for the defendant in his earlier evidence as he was then trying to interpret the letter from Cempaka Holdings to the plaintiff dated 5 September 1997 (bundle D p 25) which was referred to him by counsel for the defendant. The court was prepared to accept the explanation of PW1 and to hold that PW1 was not inconsistent in his evidence and that it was not the plaintiff that had remitted the said sum to Cempaka Holdings on 5 September 1997.

(p) The defendant did not obtain a copy of the bank statement of Cempaka Holdings from the Public Bank Bhd before the trial commenced. The defendant only applied to Public Bank Bhd for the statement after the previous court hearing on 24 August 2010. The defendant tendered the bank statement when he was recalled as a witness. Given that the claim had been filed by the plaintiff in 2007, one would have thought that the defendant would have taken immediate steps to obtain all documents from inter alia the bank to prove that the sum deposited into the account was a loan from the plaintiff. The defendant did not even find out whether the remittance was by telegraphic transfer or by cheque. This could have been easily verified by the defendant from Public Bank Bhd as soon as he had received the demands from the plaintiff. The defendant also did not produce the audited accounts of Cempaka Holdings for the financial year ending 1997 to show the paper trail of the alleged loan sum. It is quite inconceivable that the auditors did not find it necessary to ascertain from the defendant why such a large sum of money had been deposited into the account and what became of the said sum. At all material times during the trial, the defendant had merely stated that he needed the loan without giving any evidence as to the purpose of the loan and its connection with Cempaka Holdings.

(q) It is important to note that the defendant is not an ordinary lay person off the street but was a former *ketua setiausaha* of the Ministry of Culture and Tourism and was the chairman of Wembley Industries Holdings Bhd at the time the MFA was entered into. If, as claimed by the defendant that all the share transactions were false and the share trading records were fabricated, surely it would be expected of the defendant to proclaim his innocence and to lodge a police report against the plaintiff. Sadly, the defendant did not lodge any police report nor write any letter of complaint to the Kuala Lumpur Stock Exchange.

(r) The plaintiff referred to the purchase note shown in bundle D p 73 wherein the first entry of the margin financing report as at 5 June 1998 showed that the defendant had on 5 September 1997 vide CN PN064996 purchased 5 million Wembley shares at RM8,054,250. The defendant alleged that the plaintiff had contrived the scheme of share transactions on the margin account to disguise the loan given upon his security of shares to appear as share trading. Given the direct and circumstantial evidence in the case, the court cannot accept the defendant's contention of a contrived scheme as that would mean the margin financing report and all other documents related thereto were a sham. Unfortunately, besides the defendant's bare assertion, there was no evidence to show that the records were false.

(s) When the defendant was cross-examined as to why the plaintiff would grant a loan of RM8m to him without a pledge of security for that sum,

the defendant had replied 'Well, it happened!' The court considered this retort to be a flippant answer which seemed to underscore the defendant's approach and attitude taken by him in defence of his case.

(t) It is the defendant's contention that it was the plaintiff which had remitted the sum of RM7,953,750 to Cempaka Holdings on 5 September 1997 as there was no other source that would have remitted the said sum to the account of Cempaka Holdings. On this, it is the court's finding that the remittance of the sum of RM7,953,750 to Cempaka Holdings on 5 September 1997 by whosoever was a coincidence in light of the defendant's purchase of 5 million Wembley shares on 5 September 1997 for RM8,054,250.

(u) Counsel for the defendant submitted that an adverse inference should be drawn against the plaintiff for failing to tender in evidence the telephone recordings of the defendant's instructions to the dealer/remisier in respect of the share trading and that the dealer/remisier was not called as a witness in support of the plaintiff's case. I am of the view that the presumption under s 114(g) of the Evidence Act 1950 need not be invoked against the plaintiff since the documentary evidence in support of the share trading by the defendant on the margin account was comprehensive and self-speaking. The records in fact show that the defendant had given instructions to trade on no less than 37 occasions up to March 1998 but there is no evidential requirement for the plaintiff to produce the telephone recordings or to call the dealer/remisier merely to corroborate the written records of the plaintiff.

(v) On the contrary, the court is of the view that it is necessary to invoke the presumption under s 114(g) of the Evidence Act 1950 against the defendant for failing to call the person in the plaintiff company who had purportedly agreed to give the loan to the defendant. Without such a witness, the defendant's defence of a loan remained a bare assertion.

*Issue 3*

Whether the plaintiff was in breach by failing to sell the defendant's Wembley shares

**[37]** I am of the view that the plaintiff was not obliged to sell any part of the Wembley shares pledged by the defendant under the terms of the MFA. As stated in evidence, the plaintiff's share trading licence was terminated when the plaintiff went into receivership. The defendant did not take steps to instruct the plaintiff to sell his Wembley shares and as no agreement had been reached, the plaintiff could not transfer the defendant's Wembley shares to another security company to be sold. The Wembley counter was delisted in 2005/06.

*Issue 4*

Whether the MFA is invalid due to non-stamping

**[38]** The fact that the MFA was not stamped does not invalidate it. Stamping of a document required to be stamped is provided for in s 52 of the Stamp Act 1949 (Revised 1989). For convenience, they are set out hereunder:

> (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenciated by any such person or by any public officer, unless such instrument is duly stamped:
>
> Provided that —
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under section 43 or section 47A;
>
> (b) nothing herein contained shall prevent the admission of any instrument in evidence in any criminal court;
>
> (c) nothing herein contained shall prevent the admission of any instrument in evidence in any court when such instrument has been executed by or on behalf of the Government of Malaysia or of any State or of the Government of any other country or where it bears the certificate of the Collector as provided by this Act."

**[39]** The non-stamping of a document does not invalidate the document unless the non-stamping of it goes to the root or validity of the document itself.

In the Federal Court case of *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198; [1982] CLJ (Rep) 217 Salleh Abas FJ (as he then was) held:

> The purpose of the Stamp Ordinance 1949 is to impose and to collect taxes on legal and commercial documents by compelling these documents to be stamped on pain of being inadmissible.

His Lordship went on to say:

> Because a stamp objection really relates to the need of safeguarding government revenue … unless of course the lack of stamping goes to the root or validity of the document itself or the case is a revenue dispute.

The Malayan Banking Bhd case was cited and followed in the case of *Eng Say Kuang v Hong Leong Bank Bhd* [2008] 10 CLJ 197 where the High Court held that the issue of non-stamping of the guarantee was not a triable issue and not

relevant in an O 14 application. In 1992 Gunn Chit Tuan SCJ (as he then was) similarly held in the Supreme Court case of *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727; [1992] 1 CLJ (Rep) 1 that the non-stamping of documents concerned does not provide a triable issue.

**[40]** In this case the non-stamping of the MFA did not go to the root or validity of the document itself. It was only an issue of government revenue.

*Issue 5*

Whether the plaintiff was in breach of the Kuala Lumpur Stock Exchange Rules 1997, the Banking and Financial Institutions Act 1989 and the Securities Industry Act 1983

**[41]** In view of the finding by the court that the sum claimed by the plaintiff was due to contra losses arising from the defendant's share trading on the margin trading account and not as a result of a loan, there was no issue of any breach or breaches by the plaintiff under any of the above stated laws.

Issue 6

Whether the plaintiff's claim is time-barred

**[42]** The defendant contended that the plaintiff's cause of action arose on 27 May 1999 and that the plaintiffs claim of more than six years is time-barred under s 6(1)(a) of the Limitation Act 1953.

**[43]** The plaintiff on the other hand contended that the cause of action arose only on 18 April 2005 when the MFA was terminated and the demand for payment made against the defendant.

**[44]** In the case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 at p 232 Abdul Hamid Ag LP (as he then was) referred to the definition of the words 'cause of action' expressed by Lord Justice Diplock in *Letang v Cooper* [1965] 1 QB 232 as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another'. Following the principle enunciated in *Letang v Cooper* it is clear that the determination of when a cause of action arises in a contract is a question of fact to be decided by the court.

**[45]** In this case it is the finding of the court that the plaintiff had issued its letter of termination and demand pursuant to cl 18(a)(1) of the MFA on 18 April 2005 when the defendant failed to meet his obligations. With the notice of termination dated 18 April 2005, the six years limitation pursuant to s 6(1)(a) of the Limitation Act 1953 would expire on 17 April 2011 and as the writ of summons was filed on 20 November 2007, the plaintiff was well within time to commence this action.

**[46]** The defendant's contention that the cause of action arose earlier on 27 May 1999 cannot be accepted as on that date the plaintiff's letter was only a notification of default by the defendant and not a letter of termination. As such, time did not start to run from 27 May 1999.

**[47]** The court did not accept the contention of counsel for the plaintiff that the defence of limitation should not be considered by the court as no reference was made to it during the trial. This is so as the determination of when the cause of action arose was based on documents namely, the notice of termination and letter of demand which were already in evidence and the application of the relevant section of the Limitation Act 1953 is a matter of law for the court to decide.

CONCLUSION

**[48]** In view of the findings of fact by the court that the sum claimed by the plaintiff was for the recovery of contra losses and not for a loan, judgment was accordingly entered for the plaintiff in the sum of RM12,658,799 together with interests and cost to be taxed. It will be noted that throughout the trial the defendant did not dispute the accuracy of the principal sum claimed by the plaintiff nor challenged the calculation of interests payable thereon.

*Plaintiff's claim allowed with costs.*

Reported by Kohila Nesan